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CASE NO. 79-1944

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

J. TRUETT PAYNE COMPANY, INC.,
a corporation,
Petitioner,

vs.

CHRYSLER MOTORS CORPORATION,
a corporation,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Fifth Circuit's requirement that a disfavored automobile dealer must affirmatively show actual lost sales to favored competitors as the only means of proving the fact of actual damage, rather than permitting the jury's appropriate inference of damage to stand, impose an inflated standard for proving injury in a price discrimination case thereby effectively preventing enforcement of the Act by private attorneys general?

2. In a market where keen price competition exists, does an automobile manufacturer's substantial price discrimination, totaling $81,248.94, against one of its dealers during

a three and one-half year period, permit an inference of actual damage to the disfavored dealer so that a jury's verdict finding such damage should be sustained?

3. Does the proof of damage to competition under § 2(a) of the Robinson-Patman Act prove damage to the plaintiff under § 4 of the Clayton Act?

4. When there is both an inference of actual antitrust injury and direct proof of actual antitrust injury to the disfavored retail automobile dealer as a result of the automobile manufacturer's substantial price discriminations, is the amount of price discrimination a proper minimum amount of damages to the dealer under § 4 of the Clayton Act?

5. Did the Fifth Circuit commit plain error by holding that there was insufficient evidence to show either the fact of antitrust damage or the amount of that damage to J. Truett Payne Company, Inc.?

PARTIES INVOLVED BELOW

Chrysler Credit Corporation, plaintiff, sued J. Truett Payne Company, Inc., J. Truett Payne, and Blanche Payne on a promissory note and guaranty agreement. J. Truett Payne Company, Inc. filed a claim against Chrysler Credit Corporation and Chrysler Motors Corporation, as an additional party defendant. This case is the Robinson-Patman Act claim filed by J. Truett Payne Company, Inc. against the additional party defendant, Chrysler Motors Corporation, which the trial judge severed from the original claim made by Chrysler Credit.

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CITATION TO THE OPINIONS AND JUDGMENTS BELOW

Judgment was entered in favor of J. Truett Payne Company, Inc. (hereinafter "Payne") and against Chrysler Motors Corporation (hereinafter "Chrysler") in the United States District Court for the Northern District of Alabama, Southern Division, in the amount of $373,742.44 (App. to Pet. for Cert. 8).

The Fifth Circuit Court of Appeals reversed the judgment of the District Court in *Chrysler Credit Corp. v. J. Truett Payne, Inc.*, 607 F.2d 1133 (5th Cir. 1979). (App. 2-10). Rehearing was denied on March 18, 1980. 614 F.2d 1298 (App. to Pet. for Cert. 7).

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals, Fifth Circuit, reversing the trial court's judgment in this case was entered on December 7, 1979. Petitioner's *Application For Rehearing, or In the Alternative Rehearing En Banc,* was denied on March 18, 1980. Jurisdiction of this Court was invoked under 28 U.S.C. § 1254 (1), by filing a Petition for Writ of Certiorari within 90 days of the Fifth Circuit's order denying a rehearing. This Court granted the Writ of Certiorari to the Fifth Circuit on October 6, 1980.

STATUTES INVOLVED

15 U.S.C. § 13, otherwise known as § 2 of the Robinson-Patman Act, in pertinent part reads as follows:

> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the pur-

> chases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowing receives the benefits of such discrimination, or with customers of either of them. . . .
>
> (b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section. . . .

Section 4 of the Clayton Act, 15 U.S.C. § 15, states as follows:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

This price discrimination case was tried in the United States District Court for the Northern District of Alabama, Southern Division. The jury's verdict of $111,247.78 in favor of Payne was trebled and an attorney's fee added, resulting in a judgment against Chrysler in the amount of $373,742.44. Chrysler's Motion for Judgment Notwith-

standing the Verdict or for a New Trial was denied. Chrysler appealed.

The Fifth Circuit held that Payne had presented insufficient proof of injury and insufficient proof of the amount of damages. The Fifth Circuit reversed and directed entry of judgment for Chrysler, but did not disturb the jury's finding that Chrysler violated the Robinson-Patman Act.

Because the Fifth Circuit opined that there was a dearth of substantial evidence showing causation and amount of damage, the facts are set out in some detail to show that there was a substantial amount of direct proof supporting the jury's verdict.

The evidence in the trial showed as follows: Payne had been a Chrysler-Plymouth retail automobile dealer in Birmingham, Alabama, since approximately 1944 (TR. 40). Prior to and during a three and one-half year period from approximately December 1970 until Payne was forced out of business in May 1974, Payne competed with three other Chrysler-Plymouth dealers in a market of exceedingly tough competition in Birmingham-Jefferson County, Alabama. Customers shopping for new cars compared Payne's prices with each of the other three Chrysler-Plymouth dealers[1] competing with Payne (TR. 45-46; 124). Chrysler had been paying rebates since the early 1960's to Payne and other competing dealers on various cars they purchased from Chrysler. (TR. 444). These rebates were paid under the terms of rebate or incentive programs which Chrysler formulated during that period.

During the time frame permitted by the statute of limitations, December, 1970 through May, 1974, Chrysler cre-

[1]Those competing Chrysler dealers were Roebuck Chrysler-Plymouth (sometimes known as Car Center), Central Motors, and Bessemer Chrysler-Plymouth (sometimes known as Hall Motor Company, and later changed in 1972 to Vestavia Chrysler-Plymouth).

ated approximately sixteen rebate or incentive programs,[2] each lasting several months, under which it would make rebate payments on the new cars it sold to the four competing Chrysler-Plymouth dealers in the Birmingham, Alabama market area. Chrysler unilaterally assigned each dealer a separate and different quota for wholesale purchases and/or retail sales which each dealer had to satisfy in order to obtain the rebate payments. The rebate payments Chrysler made to a dealer on a particular car during a rebate program reduced the price of the new car purchased from Chrysler by the dealer and had an effect on and influenced the price charged the customer by a dealer (TR. 56; 62; 95; 124-125; 256; 617-618; App. 32-33; 92-93).

In almost every rebate program, Chrysler assigned Payne a higher quota than its competing dealers, and Payne had to meet that higher quota in order to receive a rebate payment. In other words, Payne had to either purchase more new cars from Chrysler or sell more new cars in order to obtain a rebate payment from Chrysler reducing the costs of those cars. Because it could not meet the high quotas, Payne actually paid more for almost every car involved in the rebate programs compared to the other dealers. The total price discrimination against Payne during this three and one-half year period of the programs was $81,248.94. As a result of the higher quotas assigned Payne and the rebates paid by Chrysler to the other qualifying dealers, Payne lost sales because it was at a trade disadvantage with those competing dealers. (R. 65-67; 68-69). Payne could not meet

[2]All rebate programs in this case involved only retail sales and were introduced as Pl. Ex. 1-16 (TR. 49-51). Fleet sales are not involved in this suit. Payne does not complain that the two end-of-the-year "stock rebate" programs were discriminatory since they did not set quotas for any dealer as a condition to participating. To the contrary, those end of the year stock rebate programs were the only programs where quotas were not set differently for each dealer, and hence they were totally non-discriminatory and did not result in any price discrimination.

the low price that the other Chrysler dealers were offering in the Birmingham market. (TR. 91, 124). These rebate programs, which had been in use since the 1960's, were run almost continuously so that almost every car that was sold at retail by Payne and its competitors from November 1970 through May 1974 was covered by a rebate program.[3]

Because of the disadvantage at which the rebate programs put Payne, Payne ended up forcing business in order to make a sale, and Payne still lost customers and sales. (R. 65-69; 91-92; 94-95; 126-127; App. 34-37; 95). In order to make a sale of a new car, Payne had to over-allow on the used car traded in by the customer. (TR. 55; 711-712; App. 223-224). Payne had to sell at a smaller profit than it could afford to sell and still compete effectively, and generally it still could not meet the lower prices of the other dealers. (TR. 91; 124; App. 92). Payne was losing customers and sales because of the rebate programs. (TR. 65-67; 68-69; 91-92; 94-95; 126-127; App. 36-37; 52). For the last five years of its operations, Payne lost money, primarily because of its losses in the used car operations. (TR. 538-539).

Dr. George Ignatin, an economist at the University of Alabama, testified that the rebates per car paid by Chrysler to each dealer under those rebate programs reduced the dealer's cost on that car. (TR. 138; App. 96-97). Chrysler's expert witnesses also testified that the rebate reduced the dealer's cost of the cars. (TR. 527; 618). Dr. Ignatin was thoroughly familiar with the car market in Birmingham

[3]*See* Pl. Ex. 1-16, and the dates during which the programs were running. In examining these Exhibits which contain the results of the four dealers' participation in each of the rebate programs, it is evident that the dealers received rebates on thousands of cars that they sold. Def. Ex. 31 (TR. 539; App. 268) shows the retail sales made by the various dealers in 1971, 1972 and 1973. In comparing the total number of new sales made (from Def. Ex. 31) with the dealers' participation in the rebate programs (in Pl. Ex. 1-16), it is obvious that there were rebates paid on almost every single car sold at retail by the various dealers.

and did several studies about the Birmingham market (TR. 201; 695). Chrysler's rebate programs reduced competition in the Birmingham market between Chrysler dealers and had an adverse effect on competition (TR. 222; App. 130-131). As a result of the rebate payment to the competing dealer, Payne could not compete as well with the other dealers because it got less of a price reduction on the cars (TR. 203; 256-257; App. 130-131). The rebates actually injured Payne's business by causing it to lose profits it would have otherwise made had Chrysler's prices been equal and by diminishing its ability to compete for sales. (TR. 256-258; App. 135-138).

The effects of the price discrimination are most evident when compared to the tight profit margins. Profit margins on used cars, which were a part of the price components of a dealer's new retail sales, were very tight. Gross profit per used car varied in 1971 from $104 per car for Payne to $291 per car for Vestavia; in 1972, from $123 for Payne to $246 for Roebuck; in 1973, from $108 for Payne to $253 for Central (Def. Ex. 31; TR. 539; App. 269). The net profits per used car in 1971 ranged from $13 for Payne to $118 for Vestavia; in 1972, from $27 for Payne to $90 for Roebuck; in 1973, from $12 for Payne to $142 for Central (Def. Ex. 31 and 41; TR. 539; 613; App. 269). Rebates, on the other hand, were sometimes as much as $300 per car. See, for example, Pl. Ex. 52; TR. 222-223; App. 243.

It is well known in the automobile industry that all dealers discount off list price in setting the retail price of the car. Because of these rebate payments, Payne could not discount its cars from list price as much as it could have if it had received the same rebate per car as the other dealers competing with Payne at that time. Other competing dealers therefore did not have to discount their price on new cars as much as they otherwise would have done had Payne

received an equal rebate per car from Chrysler. The effect of the discrimination against Payne under the Chrysler rebate programs was to maintain a retail price to a consumer at artificially high levels. Thus, by reducing the actual competition in the market the rebates had an adverse effect on competition and on the consuming public (TR. 203-204; 222; 255; App. 130-131; 134-135).

The price discrimination from the rebate programs was one of the causes[4] of Payne's going out of business in May, 1974 (TR. 68-69; 100; 705-706; App. 65; 222-223). Without those price discriminations, Payne's expenses would have been less, and Payne could have stayed in business. Payne's business as of May 1974, when it was forced out of business, was valued at between $50,000 and $170,000. (TR. 75-76; 115-116; 210-218).

An expert economist reviewed and analyzed each of the rebate programs. He calculated for each program how much more money the favored dealers received on a per car basis than did Payne under that same program, as well as the amount of discrimination resulting to Payne in each program (*See*, Pl. Ex. 37-53; TR. 140-184; 222-223; App. 228-244). In almost every instance, a different rebate per car was paid to each dealer on the same model car for which each qualified. In almost every instance, Payne was disfa-

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[4]In its opinion, the Fifth Circuit stated that the economist, Dr. Ignatin, prefaced his testimony that the rebate programs were a cause of Payne's going out of business by stating that "I really can't tell you without having you know—it's a hypothetical question." 607 F.2d at 1135, n. 4. This is a totally inaccurate recounting of what Dr. Ignatin said. Dr. Ignatin made that statement in response to a question by the attorney for Chrysler as to whether or not, in Dr. Ignatin's opinion, a company like Chrysler could devise an incentive program that paid a dealer monies based on that dealer's strength potential compared to other dealers. (*See*, TR. 705-706). That statement by Dr. Ignatin did not in anyway contradict, or even relate to, his opinion that the rebate programs, as applied to Payne, were discriminatory and caused Payne to go out of business.

vored and damaged[5] since it did not receive as great a rebate per car as did the more favored dealers in that program. During the three and one-half year period in issue, the total amount of price discrimination against Payne on the automobiles it sold during this period was $81,248.94 (TR. 191). Of the sixteen programs analyzed, only three were non-discriminatory to Payne. Two of these programs did not have different purchase or sales quotas established for the various dealers, but gave rebates to all dealers equally on a per car basis. Only in one rebate program where different quotas were established for each dealer was Payne not disfavored. Payne did not claim any damages resulting to it from those three programs.[6]

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[5]Payne complained of discrimination in thirteen out of the sixteen programs:

Winter Winers, (Pl. Ex. 1, 37 and 38; App. 228-229); 1971 Big Dollar Payoff, (Pl. Ex. 2, 39, and 40; App 230-231); Summer Sellout (Pl. Ex. 3 and 41; App. 232); Winter Profit Days (Pl. Ex. 4 and 42; App. 233); Chrysler-Plymouth Sell Now (Pl. Ex. 7 and 44; App. 235); Chrysler-Plymouth/Fury Profit Program (Pl. Ex. 6 and 45; App. 236); Cash In With Chrysler (Pl. Ex. 8 and 46; App. 237); Clean Up and Cash In (Pl. Ex. 9 and 47; App. 238); 1972 Summer Sweepstakes (Pl. Ex. 10 and 48; App. 239); Chrysler-Plymouth Triple Pay (Pl. Ex. 11 and 49; App. 240); Fury-Chrysler-Imperial "Twin Deal Dollars" (Pl. Ex. 12 and 50; App. 241); Super Earnings (Pl. Ex. 14 and 52; App. 243); Prime Rate on Eights (Pl. Ex. 16 and 53; App. 244). See generally, TR. 140-185; 222-223.

The other rebate programs consisted of two types: (1) non-discriminatory stock rebate programs (Pl. Ex. 5 and 13), and (2) a program in which Payne was not discriminated against, but did have to satisfy quotas before participation (Pl. Ex. 15). In the 1971 Stock Eliminator program (Pl. Ex. 5 and 43; App. 234) and the Chrysler-Plymouth Early Cleanup Bonus" (Pl. Ex. 13 and 51; App. 242), Chrysler offered a non-discriminatory rebate to all dealers without setting different quotas for each dealer. Payne did not claim any damages from those programs because they were not discriminatory. In "C" Body Bonus, (Pl. Ex. 15 and 54; App. 245), Payne claimed no damages and was not discriminated against even though discriminatory quotas were assigned.

[6]*See,* the "1971 Stock Eliminator Program", (App. 234), "Chrysler-Plymouth Early Clean-up Bonus," (App. 242), and G-Body Bonus" (App. 245) mentioned the previous footnote.

SUMMARY OF ARGUMENT

The plaintiff in a private price discrimination action must only prove sufficient price discrimination from which a jury can infer injury to competition. This inference of injury to competition is regularly permitted in public cases enforcing § 2 (a) of the Robinson-Patman Act. *F.T.C. v. Morton Salt Co.*, 334 U.S. 37 (1948). An injury to competition is inferred where there is a substantial price discrimination, keen competition, or where the price discrimination is reflected in the retail price. When a plaintiff shows injury to competition, he simultaneously shows injury to his business or property for purposes of recovering damages under § 4 of the Clayton Act.

Section 4 of the Clayton Act requires that a plaintiff prove a violation of the antitrust laws, a cognizable injury attributable to a violation of the antitrust laws and some indication of the amount of the damage. This injury is shown by the increase in costs from the price discrimination and a corresponding reduction in profit. The "amount of damage" requirement is satisfied by the amount of the price discrimination. *Bruce's Juices v. American Can Co.*, 330 U.S. 743 (1947). Plaintiff does not have to prove specific lost sales and lost profits as held by the Fifth Circuit.

The jury in the trial of this case found a violation of the Robinson-Patman Act and the Fifth Circuit did not disturb this finding. The jury was entitled from the evidence to infer an injury to competition, and hence to Payne's business, because there was a substantial price discrimination in a market of keen price competition where profit margins were fairly small. *F.T.C. v. Morton Salt Co., supra; Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969); *Bargain Car Wash v. Standard Oil Co. (Indiana)*, 466 F.2d 1163 (7th Cir. 1963); *Fowler Manufacturing Company v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert.*

denied, 396 U.S. 1012 (1970). The injury to competition was direct injury to Payne's business.

The Fifth Circuit's decision reversing the trial court's judgment was based on two factors: (1) the alleged failure of Payne to introduce substantial evidence of the "fact" of actual injury under § 4 of the Clayton Act, and (2) the alleged failure of Payne to introduce substantial evidence of the amount of such injury. By holding that Payne had failed to show injury without proof of lost sales or profits, the Fifth Circuit recognized the "pass-on" defense which was repudiated by this Court in *Hanover Shoe v. United Shoe Machinery,* 431 U.S. 481 (1968) and *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977), and misinterpreted the decision in *F.T.C. v. Morton Salt.* Its decision seriously inhibits the effective private enforcement of the antitrust laws under § 4 of the Clayton Act by requiring that a private plaintiff in a price discrimination case show lost sales or profits.

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977), does not require a plaintiff to show lost profits or sales to establish the fact of injury under § 4 of the Clayton Act. Injury in the form of increased costs (reduced profits) is the damage the Act is designed to remedy. The total amount of the price discrimination is a proper measure of damages under the principles of *Bruce's Juices v. American Can Co.,* 330 U.S. 743 (1947), *Hanover Shoe v. United Shoe Machinery Corp.* and *Illinois Brick Co. v. Illinois.* In addition to the amount of the price differential damages, Payne proved that the price discrimination was a material contributing cause of its going out of business. Because Payne showed a violation of the antitrust laws, injury of a type prohibited by the antitrust laws, and the amount of the price discrimination, his minimum damages recoverable should be the amount of that price discrimination.

ARGUMENT

I. Proof Of Injury To Competition Under Section 2(a) Of The Robinson-Patman Act Permits An Inference Of Injury Under Section 4 Of The Clayton Act.

The jury's finding of price discrimination was not challenged by the Fifth Circuit's opinion. Nor was the fact that Chrysler was found to have violated the Robinson-Patman Act. The Fifth Circuit's decision reversed the judgment for Payne based on two factors under § 4 of the Clayton Act: (1) alleged failure of Payne to introduce substantial evidence of the causation or "fact" of actual injury, and (2) alleged failure of Payne to introduce substantial evidence of the amount of such injury. *Chrysler Credit Corp. v. J. Truett Payne,* 607 F.2d 1133, 1136 (5th Cir. 1979). For reasons outlined below, the Fifth Circuit erred in reaching those conclusions and in overturning the jury verdict. Substantial evidence was introduced at trial proving actual injury to Payne attributable to the price discrimination and the amount of such injury.

The Fifth Circuit required Payne to prove actual lost sales and profits to support the fact of injury under § 4 of the Clayton Act. *Id.* at 1136. Such a requirement is contrary to the case law and to the policy encouraging the private enforcement of the antitrust laws. The impact of the higher price from Chrysler to Payne cannot be measured in terms of how many sales were lost or "could have been made" by Payne had the price from Chrysler to Payne been equal to the price offered by Chrysler to the other competing dealers. This Court in *Illinois Brick Company v. Illinois,* 431 U.S. 720 (1977), and *Hanover Shoe v. United Shoe Machinery Corp.,* 392 U.S. 481 (1968), established that a plaintiff need not show lost sales. The impact of a single change in relevant conditions, such as the price of

the product from a supplier, cannot be accurately measured in terms of its effect on sales. Proof of such economic analysis only tends to complicate and needlessly protract the litigation of antitrust cases and to hinder effective private enforcement. Thus, the amount of a price discrimination is both a proper and practical measure of damages.

Other cases supporting this "minimum damage" rule also hold that a plaintiff has proven damage to his business by the price discrimination and may recover at a minimum the price differential once he proves a violation of § 2(a) of the Robinson-Patman Act. *Bruce's Juices v. American Can Co.*, 330 U.S. 743 (1947); *Fowler Manufacturing Co. v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied* 396 U.S. 1012 (1970). Therefore, the Fifth Circuit's decision in this case unreasonably increased the burden of proof on the plaintiff by imposing an inflated standard to prove the fact of damage under § 4 of the Clayton Act.

(a) The Substantial Price Discrimination Against Payne Allowed the Jury to Infer Injury to Payne's Business.

Payne's burden of proving the fact of damage is satisfied by proof of *some* damage flowing from the unlawful price discrimination. It is enough if the price discrimination is shown to be a material cause of the injury. Payne need not exhaust all possible sources of injury in satisfying its burden of proving injury under § 4 of the Clayton Act. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 144, n.9 (1969); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 702 (1962).

The Fifth Circuit's requirement of lost sales and lost profits conflicts with the principles of *Bruce's Juices v. American Can Co.*, *F.T.C. v. Morton Salt*, and *Zenith Radio Corp.* This Court said in *Zenith*:

> The trial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the fact-finder may 'conclude as a matter of just and reasonable *inference* from the proof of the defendant's wrongful acts and their tendency to injury plaintiff's business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendant's wrongful acts had caused damage to the plaintiffs.'

395 U.S. at 123-124 (emphasis added).

By overturning the jury verdict, the Fifth Circuit in effect says it will not even permit a jury to infer injury in a Robinson-Patman case.

In *F.T.C. v. Morton Salt Co.*, this Court considered the type of proof needed under § 2(a) of the Act to show injury to competition. This Court stated the test applicable to both public and private Robinson-Patman cases:

> Here the Commission found what would appear to be obvious, that the competitive opportunities of certain merchants *were injured* when they had to pay respondent substantially more for their goods than their competitors had to pay. . . . [T]hat fact would not tend to disprove *injury* to the merchant compelled to pay the [higher] price.

334 U.S. at 46-48 (emphasis added).

Damage, in the form of reduced profits, is the form of injury this Court found to be obvious when there is substantial price discrimination which injures competition. The Court noted that a merchant was actually injured when compelled to pay a higher price than his competitors. *Id.*

at 48. Charging a higher price to one purchaser than is charged to his competitors for the same products diminishes the purchaser's profits, and hence his opportunity to compete. Thus, competition was injured. Although *Morton Salt* was not a private case, the injury to the disfavored purchaser's business was held to exist as a result of the substantial price discrimination. The same proof would obviously show damage to the disfavored purchaser's business under § 4 of the Clayton Act.

Consistent with its analysis in *Morton Salt* this Court has recently held that a private consumer, suing under § 4 of the Clayton Act, is injured in his business or property when he pays more for a product than he legally should. *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979). Payne also showed it paid more and thus was injured under § 4.

This Court previously held in *Bruce's Juices* that proof of price discrimination caused damage to a plaintiff and would permit recovery of damages in at least the amount of that discrimination. Bruce's was concerned about the difficulty of proving damages, but this Court assuaged its fears by pointing out that proof of price discrimination under the Act automatically permits a recovery of the amount of that discrimination. 330 U.S. at 757. It is an anomaly that the very thing that the Supreme Court said could not happen in *Bruce's Juices* has happened in this case. The Fifth Circuit never addressed *Bruce's Juices* even though it is this Court's authoritative statement on damages under the Robinson-Patman Act.

The Fifth Circuit has often recognized that the facts of certain price discrimination cases will support an inference of causation. *Hanson v. Pittsburg Plate Glass Industries, Inc.*, 482 F.2d 220, 227 (5th Cir. 1973), *cert. denied* 414 U.S. 1136 (1973) (private case); *Foremost Dairies, Inc. v.*

F.T.C., 348 F.2d 674 (5th Cir. 1965); *American Can Co. v. Bruce's Juices*, 187 F.2d 919 (5th Cir.), *modified on other grounds and rehearing denied*, 190 F.2d 73 (5th Cir), *cert. dismissed*, 342 U.S. 875 (1951) (private case). In *Foremost Dairy v. F.T.C.*, the court considered whether the F.T.C. could properly infer the probability of injury to the *customers* of Foremost if they did not receive certain price reductions. In that case, the evidence showed that the rebates were *not* passed through by the purchaser to the ultimate consumer so as to reduce the price of the product. Even though there was no resulting price reduction to the consumer, the court held that if the rebate, which in effect was a price reduction to the purchaser, is sufficient to afford that purchaser a significant savings, and it would, if reflected in the resale price to the consumer, have a noticable effect on the decision of the consumer to purchase, then "an inference of injury [to competition] may properly be indulged." *Id.* at 680. The court held that it was unnecessary that there be evidence to prove that the favored customer actually undersold his competitors. The substantial price advantage given by the rebates could afford the favored buyer a material capital advantage by enlarging his profit margin or enabling him to offer customer-attracting services which gave him substantial advantage over his competition. *Id.* Thus, an injury to competition is also an injury to the business of the disfavored customer.

The seventh circuit also recognizes that price discrimination injures competition and damages the disfavored purchaser. In *E. Edelman and Company v. F.T.C.*, 239 F.2d 152, 154-155 (7th Cir. 1956), the court held that a price differential, without more, in the context of keen competition and tight profit margins, furnishes sufficient proof to infer injury to competition under the Robinson-Patman Act. In the instant case, price competition was keen, the

discrimination was substantial, and the profit margins were very small[7] when compared with the large rebates. *See*, for example, Plaintiff's Exhibits 14 and 52; TR. 49-51; 222-223; App. 243.

In *Bargain Car Wash, Inc. v. Standard Oil Co. (Indiana)*, 466 F.2d 1163 (7th Cir. 1972), former Justice Clark discussed the elements required to show causation so that a plaintiff might recover under the Robinson-Patman Act. Justice Clark cited *F.T.C. v. Morton Salt Company* where the Supreme Court said that the price differential must only be a "substantial" price differential sufficient to "influence retail prices" before an inference can be sustained to show a substantial lessening of competition. Plaintiff need *not* show lost sales. 466 F.2d at 1174. *See also, Perkins v. Standard Oil of California,* 395 U.S. 642, 644-645, 648-649 (1969). Justice Clark also cited with approval the concurring opinion of Justice White in the case of *Perma Life Mufflers, Inc. v. International Parts Corp.,* 392 U.S. 134, 143-144 (1968):

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[7]Rebates sometimes were several hundred dollars per car. Chrysler's own analysis of the profits showed that competition was keen and profits fairly low compared to the amount of the rebate on each car. *See* pg. 6, *supra*. Given the fact that the amount of price reduction under the rebate programs were sometimes as much as $300 per car (Pl. Ex. 52; App. 243), that Payne having to "over-allow" on the used car trade ins in order to get new car business, and that Payne always had the lowest profit margins on its used car operations, the jury could easily find that Payne was caused to lose sales and profits and eventually go out of business because of the rebate programs.

This same analysis can be used to compare the price differentials to the profits on new car operations. Because Payne had chosen to "over-allow" on its used cars to gain the new car sales, the net profit figure on new cars may be slightly inflated for Payne. Nevertheless, when taking Payne's net profit figures from its dealer financial statements (Pl. Ex. 17-35) and comparing them to the other dealers' net profits as shown on their dealer financial statements, the average net profit margins in 1971 varied from $-32.59 per car for Central to $130.80 per new car for Vestavia; in 1972 from $26.50 for Roebuck to $197.76 for Vestavia; in 1973 from $35.00 for Central to $72.53 for Payne. These figures contain a small number of fleet sales, but those are so small as to not have any appreciable effect.

> [I]t would be enough with respect to causation if the defendant "materially contributed" to plaintiff's injury . . . or "substantially contributed notwithstanding other factors contributed also". . . .

[emphasis added].

Causation of the "fact" of damage can be inferred from the price discrimination itself. *Grace v. E. J. Kozin Co.*, 538 F.2d 170, 174 (7th Cir. 1976). When the plaintiff proves it paid a higher price for the product than it otherwise would have paid absent the discrimination, the court can infer injury to the plaintiff. *Id.* The illegal price discrimination effectively precluded the realization of [plaintiff's] maximum profit potential, so that the fact of damage was adequately established." *Id.*

During the oral argument of *Morton Salt*, Mr. Justice Jackson, who authored *Bruce's Juices*, reaffirmed the holding in *Bruce's* that a price discrimination by itself causes injury:

> "A fellow who has got to pay more, has got less left — less in profit, less to carry on the business."

United States Law Week, vol. 16, No. 36, pp. 3276-77 (March 16, 1948).

Since Payne proved a price discrimination that injured competition, it is entitled to damages.

(b) The Inflated Standard of Proving the Fact of Damage Is Contrary to the Policy of Enforcing the Antitrust Laws.

The limitation placed upon the enforcement of the Act by the Fifth Circuit's decision, which requires an almost impossible standard of proof — proof of actual lost sales and lost profits resulting from the price discrimination — will totally undermine the effective enforcement of the Act by

private parties. It requires the plaintiff to prove a totally speculative figure, i.e. to forecast the amount of lost sales in the market by assuming what plaintiff would have sold absent price discrimination. This type proof is not only difficult, but is fraught with problems of time, expense and hearsay conclusions. The imprudence of requiring proof of lost sales is shown in the following quotation from this Court's decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 492-493:

> A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine in the real economic world, rather than an economist's hypothetical model, is *what effect a change in a company's price will have on its total sales.* (emphasis added).

In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), this Court has reiterated its position that the impact of a single change in relevant conditions, such as a change in the price of the product from the supplier, cannot be accurately measured in terms of lost or gained sales. As this position is translated into the instant case, proof of the higher price from Chrysler to Payne cannot be measured in terms of how many sales were lost by Payne had the price from Chrysler to Payne not been higher than to other dealers. By requiring proof of lost sales, the Fifth Circuit circumvented this Court's holdings in both *Hanover Shoe* and *Illinois Brick*.

The fundamental purpose of the Robinson-Patman Act is to have each market participant participate on equal footing. Kinter, *A Robinson-Patman Primer* 3 (The Mac-

Millan Company 1970). Commentators recognize that the primary goal of the Robinson-Patman Act is "to preserve the independence of the small merchant as a factor in his local community." J. McCord, *Commentaries on the Robinson-Patman Act* 20 (Practicing Law Institute 1969); *Price Discrimination and Related Problems Under the Robinson-Patman Act* (Joint Comm. on Cont. Leg. Ed., Amer. Law Inst./Amer. Bar Ass'n. 2d, rev. ed. 1959). The attainment of this goal is virtually impossible under the standards set by the Fifth Circuit's opinion in this case. There is no logical reason to require additional proof of injury (specific lost sales or profits) under § 4 of the Clayton Act once a violation of § 2 (a) of the Robinson-Patman Act occurs where an injury to competition has been shown. Under the Robinson-Patman Act, when a plaintiff shows "injury to competition" by the price discrimination, that simultaneously proves the injury to his "business or property" under § 4 of the Clayton Act. *See, F.T.C. v. Morton Salt Co.* A plaintiff should not have to prove specific lost sales or lost profits. Since his business was suffering from a higher cost than his competition due to the price discrimination, his injury is clear. This price discrimination is an "over-charge" of costs which reduces the actual profits of the plaintiff's business and his ability to compete.

This Court has long encouraged the private enforcement of the antitrust laws through the use of practical damages rules. Thus, in *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946), the Court stated:

> The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risks of the uncertainty which his own wrong has created. . . . [T]he wrongdoer may not object to the plaintiff's reasonable estimate of the cause of injury and of its amount, supported by the evidence, because

> not based on more accurate data which the wrongdoer's has rendered unavailable.

This policy consideration was previously examined by this Court in the context of the same damages issue in the case *sub judice*. In *Bruce's Juices v. American Can Co.*, 330 U.S. at 751-752, the Court emphasized that Congress intended to encourage private litigants to enforce the provisions of the Act. To do so, the practical damage rule which permits damages in the amount of the discrimination should be clearly announced.

A damage rule favoring *practical* enforcement of the Act is necessary because of the ineffective public enforcement and the past failures in private enforcement. Despite clear Congressional intent to encourage private enforcement of the Act, statistics show that it has failed woefully. From 1936 to 1961, there were 111 private cases brought, but damages entered for the plaintiff in only six. Barber, *The Private Enforcement of the Antitrust Laws; The Robinson-Patman Experience*, 30 Geo. Wash. Law Rev. 181, 191-192 (1960). One commentator notes that the major reason for this woeful failure of private enforcement of the Act is the "consequential" damage rule. He explains in detail that the difficulty and complexity of proving damages has caused the private plaintiff's failure in enforcement of the Act. The issue is whether the plaintiff must

> establish his harm with a high degree of precision; must he, in short, assume the difficult burden of proving his claim almost literally to the last penny? Or should the courts be content with an implicit assumption that in most instances disfavored parties . . . will usually sustain some injury and that it may legitimately be defined in accordance with some predetermined formula — as, for example, the extent of the discrimination . . . multiplied by the quantum of the goods

purchased during the relevant time period by the disfavored party?

Id. at 211.

The commentator concludes that most effective enforcement of the Act would result if the courts would utilize the logical and correct reasoning that, once a price discrimination is proved, damage inevitably occurs to the business of the disfavored purchaser because of the higher costs than its competitors, and the amount of that damage is, at a minimum, the amount of the price discrimination.

(c) There Was Actual and Direct Proof of Antitrust Injury.

Payne submits that if all elements of the Robinson-Patman Act violation are proven, then the price difference itself is a form of lost profits. Damaging Payne's ability to compete by increasing its costs and reducing its profits is injury to competition and injury to Payne. This overcharge, or lost profit, is exactly the type of injury the Act was designed to protect against, and Payne should recover a minimum of that amount of damage.

In addition to the lost profit of the overcharge, the following direct proof showed damage caused by the price discrimination:

(1) Payne went out of business because it had to pay the higher costs of the price discrimination (TR. 68-69; 100; 706).

(2) An economist testified that the Chrysler rebate programs had caused, in fact, an injury to competition by making consumers pay a slightly higher price for cars because Payne's competitors did not have to reduce their prices below list price quite as far as they would otherwise have done had Payne not been charged a higher price from Chrysler

on the cars (TR. 203-204; 255). This higher price hurt Payne's ability to compete in this tough market (TR. 203-204), eventually being a cause of Payne's demise. Chrysler's rebate programs reduced competition in the Birmingham market between the various dealers, had an adverse effect on competition in the market (R. 222), and made Payne unable to compete as well with the other dealers as it could have had it received the same price reduction on the cars (TR. 256-257). The rebates actually injured Payne's business by causing it to lose *profits* it would have made had the cost of the cars been the same to all of the dealers and by diminishing its ability to compete (TR. 256-258).

(3) Payne had to "over-allow" on the used car trade-ins in order to obtain new car business. It also had to reduce the gross profit margin on the new cars sold in order to obtain the new car sales. (TR. 65-67; 91-92; 94-95; 126-127). Because of the lower prices from Chrysler to Payne's competition during the rebate program, Payne lost sales to its competitors which could undersell Payne. (TR. 69-70).

(4) The dealer financial statements of the four competing dealers from 1970 through 1974 (Pl. Ex. 17-35; TR. 71; 132-133) support the fact that Payne had to "over-allow" on used car trade-ins in order to obtain business, thereby showing a loss of profits in the used car portion of the business caused by the rebate programs. Chrysler's own employee testified that he noticed that Payne's used car operation was the primary area where Payne lost money, compared to the other dealers (TR. 538-539).

(5) Because of the "over-allowing" on trade-ins Payne lost money on its used car operations (TR. 97-100; 538-539; 593-599). These losses caused the line of credit extended by Chrysler Credit Corporation to be withdrawn and Payne ceased business.

(6) Chrysler was guilty of a substantial price discrimination[8] against Payne in the amount of $81,248.94 (TR. 191). There was keen competition in the market (TR. 45-48) and large rebate payments to Payne's competitors, sometimes as much as $300 per car.[9] Profit margins were generally low on the used cars and new cars. When compared to the amounts of the price discrimination per car, the profit margins were sometimes much smaller.

Perkins v. Standard Oil Company of California, 395 U.S. 642 (1969), established the basic principle applicable to jury verdicts under § 4 of the Clayton Act. This Court held that if there is *some evidence* in the record to support an inference of causation, the ultimate conclusion as to what the evidence proves is for the jury's determination. (*Id.* at 648). In *Perkins,* there was no evidence that specific lost sales were caused by the price discrimination. The evidence showed that there was substantial price discrimination, that the defendant passed on the price advantage, at least in part, to the plaintiff's competitors, that the plaintiff's business was losing money, and that Perkins complained to Standard officials of his competitor's price advantage. Similarly, in the instant case, there was evidence of substantial price discrimination which lowered the cost of Payne's competitors' cars, that Payne's business was los-

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[8]Chrysler's defense at trial was that the rebates, which were paid if the dealer attained quotas based on a "fair share" formula or a dealer's prior rate of travel, were totally fair and "proportionally or equally available" to each dealer. The Judge submitted this issue to the jury, giving a charge on proportional and equal availability under the Robinson-Patman Act. The jury obviously found against Chrysler on that issue, and it is not an issue before this Court. Therefore, the fact that the rebate programs were discriminatory to Payne because they were not proportionally or equally available to it should not be contested by Chrysler in this proceeding.

[9]*See,* for example the analysis of the "Super Earnings" rebate program which shows the results of rebate payments to various dealers under that program in amounts up to $300 per car. (Pl. Ex. 52; App. 243).

ing money and that Payne had talked to Chrysler officials about adjusting his quotas and "fair share" which caused the quotas to be so high. (TR. 73-74). The fact that Payne was over-allowing on used cars, that Payne could not meet its competitors' lower prices and was losing sales, and that Payne's share of the market was diminished established that the price advantage was passed along by Payne's competitors to their customers.

Fowler Manufacturing Co. v. Gorlick, 415 F.2d 1248 (9th Cir. 1969), *cert. denied* 396 U.S. 1012 (1970), also supports the fact that injury was directly caused by the price discrimination. The Court held:

> . . . under the Robinson-Patman Act, unless the evidence establishes a greater consequential injury, discrimination in prices or allowances is entitled to be regarded as constituting a direct business injury and that the amount thereof thus properly can be made the basis and measure of a general damage award.

Id. at 1252.

The fact of damage to Payne was proved directly.

Prima-facie proof of the fact of antitrust injury is proved in a private secondary line case whenever there has been substantial price discrimination, which is likely to affect the retail sales price, and small profit margins in a market of keen competition. This standard of proof of the fact of injury is supported by the Robinson-Patman Act itself which recognized that the antitrust plaintiff has met its initial burden of proof by showing the existence of substantial price discrimination. Section 2 (b) of the Act, 15 U.S.C. § 13 (b) states:

> Upon proof being made, at any hearing on a complaint under this Section, that there has been discrimination in price . . . the burden of rebutting the prima facie

> case thus made by showing justification shall be upon the person charged with a violation of this Section. . . .

There is no question that, under § 4 of the Clayton Act, a plaintiff must show antitrust injury resulting from the violation of the antitrust laws. Where the Fifth Circuit erred was in failing to realize that there can be proof of a *prima facie* case showing the fact of injury to the extent of the price discrimination when there is evidence of a sustained and substantial price discrimination causing an adverse effect on competition. There is nothing particularly evil or new in this. An even lesser burden of proof for a plaintiff exists in "attempt to monopolize" cases where the element of "dangerous probability" is inferred from specific intent and that specific intent can be inferred from proof of predatory or anti-competitive conduct which unreasonably restrains trade. *Gough v. Rossmoor Corp.*, 585 F.2d 381, 390 (9th Cir.) *cert. denied* 440 U.S. 936 (1979); *Janich Bros., Inc. v. American Distilling Company,* 570 F.2d 848, 853-854 (9th Cir. 1977).

Moreover, the second circuit has expressly held that:

> Proof of price discrimination satisfies a plaintiff's initial burden of showing injury to competition and shifts to the defendant the burden of proving that its acts did not substantially lessen competition.

John B. Hall, Inc. v. Waterbury Petroleum Products, Inc., 588 F.2d 24, 28 (2d Cir. 1978). *See also, Samuel H. Moss, Inc. v. F.T.C.*, 148 F.2d 378, 379 (2d Cir.), *cert. denied,* 326 U.S. 734 (1945).

In this case, the jury properly inferred injury to Payne's business as was done in *F.T.C. v. Morton Salt Co.*; *See also, Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979). Under § 2 (b) of the Act, Chrysler would have the burden of rebutting the inference of injury shown by the evidence.

Chrysler did not meet its burden of overcoming the prima facie case presented by Payne.

There was other supporting evidence of the fact of antitrust injury. Evidence showed that Payne could not meet the lower prices of its competitors and thus lost sales; and that the rebates caused this and caused Payne's going out of business. (TR. 55; 65-69). Payne's share of the market of the new car market dropped substantially from 27% in 1971 to 23% in 1972, during the time when rebate programs used the "fair share" percentages to calculate the quotas. (Def. Ex. 31; App. 268). Payne's sales rebounded somewhat to 25% of the new cars in 1973, but only because the rebate programs had been running for over two years since Vestavia had moved into Payne's trading zone and the quotas (after January 1972, based only on prior rate of travel) were less exaggerated against Payne than they were in 1971 and 1972.[10]

Ample evidence existed to support the jury's inference of injury to Payne's business. Therefore, the Fifth Circuit was erroneous in its decision holding that there was no proof of the fact of antitrust injury flowing from the price discrimination.

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[10]Although there were no rebate programs running in 1973 which based the quotas assigned to each dealer on the "fair share" percentage of the market, nevertheless there were rebate programs running which did have different quotas assigned to each dealer, with Payne receiving normally the highest quota. These quotas were based upon the previous rate of travel which would not have been a fair and accurate measurement of the market since Vestavia Chrysler-Plymouth had recently moved into Payne's primary trading zone during the middle of 1971. The jury found that the price discriminations resulted to Payne because the rebate programs and the quotas established thereunder were unfair regardless of whether the quotas were based on prior rate of travel or fair share. A prior rate of travel quota, used so soon after the move of Bessemer Chrysler to the Vestavia area right in the heart of Payne's trading zone, would have been unfair to Payne because of the market's confusion and uncertainty from having two dealers recently in the same zone. Less than 25% of the price discrimination occurred in the rebate programs the last one and one-half years of Payne's operation from January 1973 through May 1974. This compares to 75% of the price discrimination occurring from November 1970 through December 1972.

(d) Payne's Damage Was the Type of Damage that the Antitrust Laws Were Designed to Remedy.

The precepts of *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), referred to by the Fifth Circuit, do not prohibit Payne from recovering damages in the amount of the price differential. To the contrary, *Brunswick* supports Payne.

The Fifth Circuit erroneously interpreted *Brunswick* to require that a plaintiff must show injury in the form of lost sales or profits to recover under § 4 of the Clayton Act: "Competition is harmed only to the extent that the favored purchaser, by the use of the discriminatory price difference, actually draws sales or profits from his unfavored competitor." *Payne*, 607 F.2d *at* 1136. *Brunswick* did not address the question of the proper measure of damages, nor did it impose a higher standard of proof for injury to competition. *Brunswick* held only that a plaintiff must show that his injuries were the type of loss that the claimed antitrust violations would be likely to cause. *Brunswick*, 429 U.S. at 489.

The *Brunswick* opinion neither sets new standards for proof of causation nor announced a new rule for the calculation of damages. All that *Brunswick* requires is that a plaintiff's loss, however measured, occur by reason of that which made the defendant's acts unlawful. 429 U.S. at 488. In fact this Court recognized that the type of loss that the violations of the antitrust laws would be likely to cause

> does not necessarily mean . . . that § 4 plaintiffs must prove an actual lessening of competition in order to recover. The short-term effect of certain anticompetitive behavior—predatory below-cost pricing, for example—may be to stimulate price competition. But competitors may be able to prove antitrust injury before they actually are driven from the market and competition is thereby lessened. Of course, the case for relief will be strongest where competition has been diminished.

429 U.S. at 490 n. 14.

Thus, this Court clearly recognizes that injury can be inferred without proof of lost sales. The Fifth Circuit's decision ignores the basic economic reality recognized by this Court on several occasions that one who is required, due to discriminatory pricing, to pay more for his raw goods or materials than his competitors is necessarily harmed in his ability to compete effectively on price. *F.T.C. v. Morton Salt Co.*, 334 U.S. at 46-47.

In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494, this Court reiterated that an antitrust plaintiff can recover without proving more than the price difference:

> Our conclusion is that Hanover proved injury and the amount of its damages for the purposes of its treble-damage suit when it proved that United over-charged it during the damage period and showed the amount of the over-charge. . . .

Therefore, the Robinson-Patman Act provides a remedy for Payne because of Chrysler's "overcharge" in the form of the price discrimination. It does not matter whether the more favored dealers used the rebates to reduce the price of the cars purchased from Chrysler, increase their sales, pay incentives to the salesmen to increase their sales, used the rebates for other expenses in the company, or merely pocketed those rebates as extra profit. The ultimate effect of the rebates is to make Payne, the less favored dealer, unable to compete as equally or as effectively in the marketplace. Therefore, the rebates *damaged* Payne's business.

II. The Amount Of Damage Was Proved.

(a) The Amount of Price Discrimination Is the Minimum Damage in Robinson-Patman Act cases.

There is substantial case law supporting the rule that, in a market of keen competition with substantial price discrimination, the amount of the illegal price differential will be the minimum damage to the nonfavored purchaser. *Bruce's*

Juices v. American Can Co., 330 U.S. 743, 757 (1947); *American Can Co. v. Bruce's Juices*, 187 F.2d 919 (5th Cir.), *modified on other grounds and rehearing denied*, 190 F.2d 73 (5th Cir.), *cert. dismissed*, 342 U.S. 875 (1951); *Grace v. E. J. Cozin Co.*, 538 F.2d 170, 174 (7th Cir. 1976); *Fowler Manufacturing Co., v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970); *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988, 996 (8th Cir.), *cert. denied*, 326 U.S. 773 (1945); *Becker-Lehmann, Inc. v. Firestone Tire & Rubber Co.*, 202 F. Supp. 514 (D.C. Mo. 1959); *State Wholesale Groceries v. Great Atlantic & Pacific Tea Co.*, 202 F. Supp. 768 (D.C. Ill. 1961).[11]

The amount of the overcharge therefore would be the first category of direct damage. This Court has stressed in *Bruce's Juices* that the proof of damages would not be difficult since the purchaser could recover the overcharge without proving more than illegality of prices, in all but extraordinary circumstances:

> We have assumed for the purposes of this case that Petitioner could establish that the prices Respondent charged were discriminatory so that they violated the Act. But if Petitioner can show that, clearly it would be entitled to recover in a triple damage suit supported by

[11]Some courts have held that the amount of the overcharge is not necessarily proof of the amount of damages to the disfavored plaintiff. *Enterprise Industries, Inc. v. Texas Co.*, 240 F.2d 457 (2d Cir.), *cert. denied* 353 U.S. 965 (1957); *Dantzler v. Dictgograph Products, Inc.*, 309 F.2d 326 (4th Cir. 1962); *cert. denied* 372 U.S. 970 (1963); *Kidd v. Esso Standard Oil Co.*, 295 F.2d 497 (6th Cir. 1961). The *Dantzler and Kidd* cases simply say that there must be a causable connection between price discrimination and injury to plaintiff. *Dantzler* does not consider the issue of when the overcharge is a proper measure of damages. In *Kidd*, plaintiff insisted that he be awarded the overcharge as damages after a jury found a violation of § 2 (a), but the jury also found that plaintiff had suffered no damages. *Kidd* does not cite *Enterprise* and is not inconsistent with *Bruce's Juices* case. In the *Enterprise* case, the plaintiff completely failed to prove injury to itself that was caused by defendant's price discrimination. Therefore, whether or not damages should have been presumed under the facts in that case does not bear on what is the appropriate *measure* of damages when injury and causation have been proved, as they were proved in the instant case.

> the same evidence. For despite petitioner's plaint on the difficulty of proving damages, it would establish its right recover three times the discriminatory difference *without proving more* than the illegality prices. If the prices are illegality discriminatory, petitioner has been damaged in the absence of extraordinary circumstances, at least in the amount of that discrimination.

330 U.S. at 757 (emphasis added).

This holding was essential to the Court's disposition of *Bruce's Juices* and was not mere dicta. Bruce's had sought to raise the Robinson-Patman Act as an affirmative defense to a seller's action on a purchase contract for cans, alleging that the contract price was discriminatory and in violation of the Robinson-Patman Act. American Can argued that Bruce's should not be able to avoid paying for the cans all together, and if the price violated the Act, Bruce's could bring a separate law suit for damages under § 4 of the Clayton Act. Bruce's argued, however, that separate suit was an inadequate remedy because of the expense of a separate suit and because it would be too difficult to prove damages. Thus, the means of proving damages in such a lawsuit was placed directly in issue.

The Court rejected Bruce's argument, holding that the violation of the Act was not a defense to the contract. But the Court responded directly to Bruce's arguments that damages would be too difficult to prove by holding that "clearly" Bruce's could recover three times the amount of discrimination "without proving more than the illegality of the price." *Id.* The Fifth Circuit's holding in the instant case should be overturned because it destroys the protection the Act gives to small businessmen and it imposes an unrealistically high and difficult standard of proving damages.

This Court also determined in *Bruce's Juices* that the relatively moderate provisions of a draft of the Robinson-Patman Act, § 2(e), which would have established the amount of damage as the amount of the price differential, had been deleted in the final drafting of the Act because it was merely

redundant and other elements of damage should be permitted as well. This Court considered that proposed provision and stated:

> . . . [A] proposed provision of the Act, passed only by the Senate which later receded, shows that Congress gave consideration to no sanction more extreme than to compel the remission of the excess charged. . . . Congress declined to adopt this relatively moderate provision. . . .

330 U.S. at 751.

Therefore, it is clear that Congress and this Court thought the amendment would have *limited* the damages recoverable to just the price difference. The current damages provision in § 4 of the Clayton Act is much broader and routinely permits proof of other damages, in addition to the normal price differential damages. Certainly it can not be logically argued that the omission of this language from the final version of the Robinson-Patman Act prohibits recovery of damages in the amount of the price discrimination. There is no reasonable evidence to support that argument. This Court would do a great disservice to the private enforcement of the Act if it were to reverse itself and prohibit the price differential as a measure of damages. The differential damages, such as in our case, are, in essence, the minimum amount of *profit* lost by Payne on the sales it did make on the cars that cost it more than the favored dealers.

The Fifth Circuit had approved the price differential damage principle when, on the remand of the *Bruce's Juices* case from the Supreme Court, the Fifth Circuit stated:

> The evidence conclusively reveals that plaintiff's losses . . . was the result of competition from two other citrus fruit canners. . . . These two competitors had received from the defendants special discounts on the price of a particular type of Iscan which had been denied to plaintiff. This discrimination in favor of plaintiff's above-named competitors was manifestly harmful to plaintiff's business, for the reason that the costs of the juice cans represented a large percentage of the total cost of the citrus product, and the discriminatory high price paid

> by plaintiff for an Iscan of like grade and quality *diminished its profits and helped destroy its financial ability to withstand competition.*
>
> * * *
>
> We have carefully reviewed the action of the district court in awarding damages in this case, and have reached the conclusion that the judgment rendered is fully in accord with the principles enunciated in the applicable authorities. *See Bruce's Juices, Inc. v. American Can Company*, 330 U.S. 743.

American Can Co. v. Bruce's Juices, 187 F.2d 919, 922, 924 (5th Cir. 1951), *modified on other grounds and rehearing denied*, 190 F.2d 73, *cert. dismissed*, 342 U.S. 875 (emphasis added).

The Ninth Circuit's opinion in *Fowler Manufacturing Company v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied* 396 U.S. 1012 (1970), demonstrates the proper application of *Bruce's Juices*. In *Fowler*, the Court held that the congressional purpose behind the Robinson-Patman Act will be better served if damages in the amount of the price differential were permitted. After an extensive and well reasoned analysis of the Supreme Court's decision in the *Bruce's Juices* case, the court stated:

> Furthermore, in a construction of the Act in relation to its purpose, it would seem apparent that such a direct-damage right would more effectively serve to curb the discriminations which Congress viewed as being most often exercised against smaller competitors, and whose abolition it sought to accomplish primarily for that reason, than the more difficult consequential-damage rule of the *Enterprise* case. In its significance for obtaining compliance with the Robinson-Patman Act, such a damage thrust is also more fully consonant with the motive which the Court recognized in *Bruce's* as underlying all private antitrust recovery, when it said:
>
> 'It is clear Congress intended to use private self-interest as a means of enforcement and to arm injured persons with private means to retribution when it gave to any injured party a private cause of action in which his dam-

> ages are to be made good three-fold, with costs of suits and reasonable attorney's fee.'

415 F.2d at 1251-1252.

(b) Price Overcharge Is The Minimum Amount of Damage in Sherman Act Cases.

The proper rule for damage in this case was established in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). *Hanover Shoe* holds that, in suing under § 4 of the Clayton Act for treble damages, a purchaser is injured in at least the minimum amount of the illegal *overcharge*. *Id.* at 494. The measure of damages should not be different in a Sherman Act case than in a Robinson-Patman Act case. Both the price discrimination in a Robinson-Patman case and the increase in the "fixed" price under the Sherman Act are illegal overcharges. In *Hanover Shoe*, the defendant, whose monopolization of the shoe machinery industry had resulted in overcharges in the form of increased costs to the plaintiff, raised as a defense that the plaintiff had passed on the illegal overcharges, thereby suffering no injury or damages. This "passing on" defense would have required proof of: (1) the factors influencing the plaintiff's pricing decisions; (2) how the plaintiff would have priced its products in a free market; and (3) what the plaintiff's total sales would have been in a free market. Removing the incentive of the overcharged direct purchaser to bring a treble damage action would substantially reduce the effectiveness of private enforcement of the antitrust laws. The Court realized that the amount of economic proof necessary to establish such a defense would be terribly expensive, time consuming and normally insurmountable. *Hanover Shoe*, 392 U.S. at 493. Thus, the Court held that the plaintiff had proved its injury and the amount of its damages merely by proving that it had been overcharged and the amount of the overcharge. *Id.* at 494.

The Fifth Circuit's requirement that a plaintiff demonstrate lost sales or profits will require an economic analysis even more complicated than that rejected by the court in *Hanover Shoe*. While there were only two parties involved in *Hanover Shoe*, a Robinson-Patman case normally involves numerous parties. A plaintiff in a Robinson-Patman Act case would be forced to analyze the effects of the price discrimination not only on his own pricing decisions, but also the effect of that price discrimination on the pricing decisions of all his favored competitors, who are not even properly parties to the lawsuit. The Fifth Circuit, therefore, has made mandatory a type of economic analysis which was not permitted by this Court in *Hanover Shoe* on the grounds that it was too complex, too wasteful of judicial time, and undermined the enforcement policies of treble damage actions.

The reasoning that led this Court to hold in *Hanover Shoe* that the amount of a price overcharge is a proper measure of damages leads equally well to the conclusion that the total amount of a price discrimination is a proper measure of damages. A price discrimination is merely a form of overcharge. An overcharge resulting from monopolization, like that in *Hanover Shoe*, is determined by subtracting the lower charge that would have been charged in a free market from the actual charge. An overcharge resulting from price discrimination (as in the case *sub judice*) is determined by subtracting the actual charge to the favored purchaser from the actual charge to the disfavored purchaser. The calculation of overcharge in a monopolization case is even more speculative than in a price discrimination case since the theoretical price in a free market cannot be determined empirically, whereas the actual charges in a price discrimination situation can.

In both situations there is an illegal overcharge. The gravamen of the violation in both cases is that the plaintiff has been charged to much and should be compensated for the overcharge. There is no statutory basis for distinguishing between a price overcharge and a price discrimination. *See, City of Mishowaka v. American Electrical Power Co.*, 465

F.Supp. 1320, 1340 (N.D. Ind. 1979), holding that a distinction drawn in *ICC v. United States*, 289 U.S. 385 (1933), between price overcharge and price discrimination is either inapplicable to antitrust actions or overruled by *Hanover Shoe*.

In *Illinois Brick Co., v. Illinois*, 431 U.S. 720 (1977), this Court reaffirmed the holding of *Hanover Shoe*, citing with approval the Court's holding that a purchaser is injured at least in the amount of the illegal overcharge. *Id.* at 724. In that case, the Court was considering damages in a § 1 Sherman Act case for overcharges to indirect purchasers who were trying to recover the amount of the overcharge which had been passed on by the direct purchaser of the antitrust violator. The Court held that even if the direct purchaser had passed on the illegal overcharge, the indirect purchaser could not recover in an antitrust suit for that illegal overcharge. Only the direct purchasers were allowed to sue to recover the amount of the overcharge because this encouraged private enforcement of the antitrust laws and simplified the litigation. Therefore, even if there had been no lost sales or lost profits, the plaintiff would be able to recover the amount of the illegal overcharge.

(c) The Amount of the Price Discrimination Is A Practical Measure of Damages.

Like the overcharge in a Sherman Act case, the price discrimination is an element of the damage in this case. The rebate programs directly caused Payne two separate categories of damage redressable under the Robinson-Patman Act: (1) reduction of profits on current sales, i.e., loss of profits by its higher costs (the overcharge), and (2) the going concern value of Payne's business which the rebate programs caused to fail. Payne could not measure the reduction of profits except in the minimum amount of the price discrimination. Evidence of the value of the Payne business ranged from $50,000 to $170,000. Clearly, the injury to Payne is exactly the type of loss and damage that the Robinson-Patman Act

was designed to compensate. Substantial evidence showed the amounts of that damage. If the price discrimination is shown to have an adverse effect on competition, then that "effects" damage to Payne in those amounts.

Courts have held in numerous cases that, after showing an injury to the business resulting from the violation of the antitrust laws, the plaintiff has a lesser burden of proof in showing the *amount* of damage. *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100 (1969); *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946); *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 23-24 (5th Cir. 1974), *cert. dismissed*, 49 U.S. 987 (1974). All the plaintiff must do after showing injury resulting from violation of the antitrust laws is to show "some indication of the amount of the damage done." *Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266, 270 (5th Cir. 1979).

Chrysler and the Fifth Circuit have relied on a Second Circuit case which held that increased costs (the price discrimination) to the purchaser is not a direct damage unless the plaintiff proves that the increased cost was absorbed, and not passed on to the customers. *Enterprise Industries, Inc. v. Texas Company*, 240 F.2d 457 (2d Cir. 1957), *cert. denied* 353 U.S. 965 (1957). Both *Enterprise* and the Fifth Circuit's decision require plaintiff to demonstrate that it did not pass on the discriminatory charge to its customers, and lost sales because of it. Essentially they both utilize the pass-on theory as a defense to a Robinson-Patman case, and are inconsistent with the Supreme Court's decisions. *Illinois Brick* and *Hanover Shoe* have both rejected the "passing-on" theory, whether it be as a defense, as in this case, or as a weapon for an indirect purchaser to use as a plaintiff in an antitrust suit. Therefore, *Enterprise* has been overruled.

(d) Damages Awarded In This Case Were Appropriate Under Any Standard.

The Fifth Circuit erred in two respects: (1) there was actual proof of causation of antitrust damage to Payne, and

(2) the measure of damages to Payne would be, at least the total amount of price discrimination and the going concern value of the business. The trial court correctly charged the jury that the amount of the price differential could be considered by it in determining the amount of any damage that it might find Payne suffered, but the trial court incorrectly charged that amount of differential was not automatically a measure of damage (R. 806-807).[12] Despite the higher standard, the jury properly found from the evidence both types of damages.

Payne submits that the district court's judgment in the full amount should be reinstated. There was evidence of direct damage to Payne's business caused by the rebates totaling

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[12]The trial judge incorrectly instructed the jury on the elements of damage. He stated:

> . . . the question is not how much better off the plaintiff, Payne, would have been if it had received the same concessions as the favored Chrysler-Plymouth dealers, but rather how much worse off Payne is because others received such concessions.
>
> The plaintiff, Payne, is only injured if you find that as a proximite result of a violation of § 2(a) of the Robinson-Patman Act by the defendant, Payne lost customers to the favored dealers for Payne was forced to lower its retail price in order to compete with the favored dealers; and I might add, to pay more for used cars traded in on new automobiles, an over-allowance.
>
> • • •
>
> Moreover, I further charge you that as a matter of law, you cannot compute damages for the period. . . by merely taking the differences between the price alleged to have been paid by Payne Company and the price allegedly paid by the favored Chrysler-Plymouth dealers. The law allows the plaintiff only to recover damages actually sustained by reason of a violation of the Robinson-Patman Act, and therefore, the mechanical price difference, as such, in and of itself, is not the proper measure of damages in this case. (TR. 803-804; 806).

Payne excepted to that charge. Nevertheless, the jury found Payne to have met that inflated standard of proof, and that Payne had showed actual damage to its business by virtue of a violation of the Act. Even if the Court were to find that the amount of price discrimination is not the correct minimum amount of damage, the Fifth Circuit committed plain error by reversing the jury verdict because of substantial evidence of the fact of damage and evidence showing an indication of the amount of damage.

$81,248.94. A prima facie case of damage to its business was established by the injurious discrimination, and Chrysler never rebutted that prima facie case. In any event, there was certainly sufficient evidence from which the jury could *infer* actual injury to Payne's business if one assumes there was no direct proof of causation.

One of the categories of damage suffered by Payne, in addition to the minimum amount of price discrimination, was the failure of Payne's business resulting from the price discriminations it had suffered over the years. Competent evidence from an economist and from the owner of the business showed that the value of the business was between $50,000 to $170,000 at the time it failed in 1974. The jury returned a verdict of $111,247.48. If, for some reason, this Court believes the going concern value of Payne's business to be too speculative, the damages, at a minimum, in the amount of the price discrimination of $81,248.94 were proved. This Court should then affirm the judgment in at least that amount.

To recover for a violation of the Robinson-Patman Act a plaintiff must prove several things: (1) a violation of § 2(a) of the Act, and (2) some injury in fact to his business resulting from the price advantage given the favored purchaser. Injury to competition is shown when there is substantial price discrimination in a keen market with fairly low margins. At the same time injury to competition is shown, the plaintiff has established damage to his own business or property. A competitively harmful business practice exists in his own industry which was caused by the price discrimination. Yet the Fifth Circuit's decision requiring proof of lost sales in effect leaves the plaintiff no remedy and permits the defendant who has been found to have engaged in illegal conduct to continue to exact the excessive charge. In effect, a defendant could admit liability in a Robinson-Patman Act case stating that it had discriminated in price but would have judgment in its favor because the damages could not be *measured* by lost sales.

Under the decision of the Fifth Circuit the violator is not required to pay back the monies wrongfully charged but only must pay any lost sales and profits resulting therefrom. In the business world, a "lost sale" and the reasons therefore could only be proven through examination of the mental processes of the lost purchaser. In the automobile, grocery, appliance, gasoline, and other similar industries, such proof would require testimony from literally thousands of actual and potential customers over a substantial period of time and would not avoid causation problems resulting from other subjective factors involved in a decision to purchase. This standard of proof cannot be met in any industry where there are multiple sellers and purchasers and other substitute products. As was the case in *Hanover Shoe*, where a price discrimination has spanned many years it is extremely difficult to determine whether and to what extent the plaintiff would have "passed on" the discrimination to his customers, or where his customers would have gone. The additional time and expense involved in litigating such questions would produce inevitable deterent effects on private antitrust actions which the Supreme Court has sought to avoid. This very problem is reason enough to stop the spread of such a restrictive burden under the Robinson-Patman Act.

Once the illegality of the price and injury to competition and business have been proven, the plaintiff at a minimum should recover back the monies wrongfully paid. The violator certainly should not be entitled to keep the benefits of his illegal charge. The source of that benefit has been the plaintiff and the monies should be returned to him.

CONCLUSION

The Petitioner prays that this Court:

(1) Reverse the Fifth Circuit's judgment which directed the district court to enter judgment for Chrysler Motors Corporation;

(2) Reinstate in full the judgment of the district court, plus interest from the date of the original judgment;

(3) Award Petitioner costs of court and a reasonable attorney's fee for all work during the appellate proceedings of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing Brief on the Merits has been served upon counsel of record for all parties to this proceeding by depositing the same in a United States Post Office with first-class postage prepaid to J. Frederick Ingram and J. Ross Forman III, counsel of record for Chrysler Motors Corporation, at their post office address on the .... day of ....., 1980.

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Of Counsel